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No. 89-20

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

STERLING ELECTRIC, INC.,

Petitioner,

v.

PARTS AND ELECTRIC MOTORS, INC.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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RESTATEMENT OF QUESTIONS PRESENTED

1. Whether a petitioner who fails to preserve issues at trial can obtain this Court's review.

2. Whether the time for applying for a writ of *certiorari* runs anew from the disposition of a collateral attack on a final judgment of the Court of Appeals.

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DESIGNATION OF CORPORATE RELATIONSHIPS

Parts and Electric Motors Inc. is not owned by any parent corporation and has no subsidiaries. Complete Electric Motors, Inc. is an affiliate of Parts and Electric Motors, Inc.

STATUTES AND COURT RULES DISCUSSED

28 U.S.C. § 2101(c) provides:

> Any other appeal or any writ of *certiorari* intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of *certiorari* for a period not exceeding sixty days.

Fed.R.Civ.P. 51 provides:

> At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury. The court at its election, may instruct the jury before or after argument, or both. No party may assign as error the giving or the failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection. Opportunity shall be given to make the objection out of the hearing of the jury.

Sup.Ct.R. 17.1(a) provides:

> A review on writ of *certiorari* is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.

(a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

COUNTERSTATEMENT OF THE CASE

None of the issues which petitioner Sterling Electric, Inc. has raised since the jury's verdict in September 1985 were preserved at trial. Those issues, raised in its post-trial motions, two separate appeals, two separate motions for rehearing and for rehearing *in banc*, and now in its

petition for writ of *certiorari*, were therefore waived. Petitioner largely ignores its own theories presented at trial, its own admissions and stipulations and, instead, seeks to have this Court let it do what the Seventh Circuit has repeatedly refused: "wriggle out of a legal theory it argued unsuccessfully to the jury." (866 F.2d 228, 234, "P&E II" Pet. App. 12a.) Hardly a compelling reason for this Court to grant a writ of *certiorari*.

While petitioner now argues that respondent failed to present proof of the likelihood of market power in the market for electric motors (the tied product), it unequivocally waived this issue at trial by failing to object to the crucial jury instructions. At trial, petitioner failed to object to the district court's instructing the jury that the relevant market for the tying product was Sterling replacement parts. Finally, the jury answered a special interrogatory finding petitioner engaged in an unreasonable restraint of trade. (App., *infra*, 2.) Without objection, the jury was instructed that a "rule of reason" verdict was permissible in the absence of proof of market power in either the tied or tying product market. (Tr. 927-28.)

It should be noted that petitioner is being less than candid when it implies that the judgment in this case is the result of business differences between two small companies. (Pet., pp. 2-3; moreover, the petition also violates this Court's Rule 28.1.) The tying arrangement which is the subject of this action was the device of an industrial giant. The events giving rise to this action have their origin in A.O. Smith Corporation's 1980 acquisition of Sterling Electric, Inc. (Tr. 616, 623, 724, 725 and 728.) In 1984, A.O. Smith's electrical products sales totaled $154,100,000, out of $864,144,000 in total sales. (A.O. Smith, Form 10-K, March 29, 1988 at p. 3.) Actually, Sterling

Electric, Inc. no longer exists. Its assets were sold on December 31, 1988. Only a corporate shell remains. A.O. Smith has, in fact, agreed to be responsible for the judgment.

The Trial

At trial, respondent proved every element of both a *per se* and "rule of reason" tying case. Respondent presented evidence, including admissions of petitioner, to show that petitioner had market power in the market for the tying product, Sterling replacement parts. By judicial admission, petitioner conceded both its dominance of the market for Sterling replacement parts and the absence of any market for electric motor replacement parts generally.

> Sterling concedes, so that no question of fact on the point exists, that the Sterling adjunct parts are unique . . . Sterling parts . . . are not interchangeable with parts manufactured by or obtainable from . . . other electric motor manufacturers.
>
> * * *
>
> Sterling concedes that it has 100 percent dominance in the market for Sterling parts. . . . Sterling's competitors [each] likewise enjoy a 100 percent dominance in the market for parts essential to the proper operation of products they manufacture.
>
> * * *
>
> Sterling parts that are essential to the proper operation of a Sterling motor and are not interchangeable with those parts manufactured by a competitor and essential to the proper operation of that competitor's motors. (sic)

(Tr. 315-317.)

In addition, respondent's expert, Dr. Skoog, testified that petitioner possessed market power under many tests

(Tr. 423-39), and that there were effective economic barriers to entry into the market for parts compatible with Sterling motors. (Tr. 495-504.) Petitioner's power over price in the tying product market was reflected by its ability to achieve significantly higher margins.

In this Court, petitioner repeatedly characterizes the tying product market as "replacement parts." (Pet., pp. 11, 13 and 16.) No such claim was made at trial where petitioner argued that the only relevant market was "electric motor services." (Tr. 771 and 891.) This new theory of the case was first asserted by appellate counsel. Petitioner did not argue to the jury that Sterling replacement parts were a product in a larger market of electric motor replacement parts. Instead, petitioner's defense was that legally there was no tie-in, rather that the case involved only one product, "electric motor services." (Tr. 771 and 891.) At closing, petitioner's trial counsel argued to the jury:

> And, you know, that's what [petitioner's expert] Dr. Lynk said the relevant market was: electric motor services. That market is motors, installation, electricity, replacement parts, and repair services. And that makes sense.

(Tr. 891.)

Petitioner's Counsel relied upon the testimony of his expert, Dr. Lynk:

> Q: Do you recall Dr. Skoog testifying that in his opinion there are two separate products and two separate product markets in this case?
>
> A: I believe that is what he said.
>
> Q: Do you have an opinion about that statement?
>
> A: Yes.
>
> Q: What is that opinion?

A: I don't believe that in any economically-meaningful sense you can split this into two significant economic markets. I think its one joint market provision of the motors and the provision of the parts that keep them running.

(Tr. 772.)

Petitioner's theory of the case at trial was that the only relevant market was "electric motor services" and that was the only market which it tried to prove existed. (Tr. 891.) On the other hand, consistent with respondent's theory of the case, respondent proved that the tying product market was Sterling replacement parts. Neither party's theory at trial was consistent with the existence of a market for replacement parts generally so that neither party argued such a market to the jury.

The Verdict and Judgment N.O.V.

The jury answered the six special interrogatories on liability in favor of respondent. (App., *infra*, 1-2; Tr. 976.) A damage verdict was returned the following day and judgment was entered by the district court. (Tr. 1099.) Petitioner then filed its motion for judgment notwithstanding the verdict or, in the alternative, for a new trial. Believing that it had erred in the jury instructions, the district court granted petitioner's motion for judgment n.o.v. and conditionally granted its motion for a new trial. (Pet. App. 41a.)

Reversal and Remand—*P&E* I

Respondent appealed the district court's ruling and the Seventh Circuit reversed and remanded. (Pet. App. 19a.) The court of appeals held that petitioner had waived the legal issues upon which the judgment n.o.v. had been based (issues it raises here) by failing to make proper objections to jury instructions or an appropriate directed ver-

dict motion. (Pet. App. 40a.) In addition to vacating the judgment n.o.v., the court of appeals held that the record evidence was sufficient to sustain the jury's verdict and that it perceived no reason for granting a new trial. Nevertheless, out of caution, the court of appeals remanded to the district court for the single limited purpose of seeking "clarification" as to whether the district court had perceived any substantial and defensible basis for concluding that the verdict was against the manifest weight of the evidence *under the instructions which were given to the jury without objection by petitioner.* (Pet. App. 39a.) The court of appeals directed the district court to enter judgment for respondent if the district court's order rested solely on the grounds stated in its order granting the judgment n.o.v. (Pet. App. 39a.) Petitioner unsuccessfully sought rehearing *in banc* of the decision in *P&E* I.

Petitioner's First Application to the Supreme Court

The Seventh Circuit's decision in *P&E* I finally determined all of the issues presented to it by the parties. No issues remained which petitioner might present to the Seventh Circuit in a second appeal. Recognizing this fact, on January 15, 1988 petitioner applied for and was granted an extension of time to April 2, 1988 to file a petition for writ of *certiorari* from *P&E* I. (App., *infra*, 3.)

The District Court's Order on Remand

On February 29, 1988, after complying with the mandate of the court of appeals in *P&E* I, the district court entered judgment in favor of respondent. Petitioner chose not to file a petition for writ of *certiorari* from *P&E* I, abandoning its right to seek review of *P&E* I in this Court. Instead, it filed a second appeal to the Seventh Circuit ("*P&E* II") raising the same issues argued and decided adversely to it in *P&E* I.

The Second Appeal—*P&E* II

In *P&E* II, petitioner reargued the same issues that were rejected in *P&E* I: Insufficient proof of market power in the tying product market and market power in the tied product market. The court of appeals in *P&E* II held that petitioner's reargument of these issues was foreclosed by the doctrine of law of the case. (Pet. App. 12a.) Petitioner sought rehearing or rehearing *in banc* of the law of the case holding in *P&E* II. That request was denied by the Seventh Circuit.

Now, for a third time, petitioner seeks to argue the same legal issues which the Seventh Circuit has twice held it waived at trial. Petitioner does not challenge the waiver holding of *P&E* I or the law of the case holding of *P&E* II. Indeed, petitioner ignores both holdings.

REASONS FOR DENYING THE PETITION

I. Summary of Argument

This case presents no issue of substantive antitrust law. Therefore, the petition for *certiorari* is wrong and misleading, and respondent does not concede anything contained therein. The decision from which review is now sought was grounded on law of the case. The earlier decision, for which petitioner consciously declined to seek review in this Court, was grounded upon waivers made at trial and other consequences of petitioner's now discarded trial strategy. Neither decision decided any issue of antitrust law.

In *P&E* I, the Seventh Circuit found that the antitrust issues raised on appeal were waived at trial, and that the

evidence in the record supported the jury's verdict that petitioner had violated the antitrust laws by tying the sale of its motors to the sale of petitioner's replacement parts. Moreover, the judgment below is independently supported by the jury's finding that petitioner engaged in an unreasonable restraint of trade in violation of the "rule of reason."

Finally, this petition comes too late. In *P&E* I, the Seventh Circuit finally determined all the issues litigated in the Court of Appeals. In January 1988 petitioner recognized that it was required to petition for *certiorari*, if at all, within ninety days after the decision. Petitioner failed to do so. It took the calculated risk that it could do better by attempting to find another more sympathetic panel of the Seventh Circuit which would reconsider *P&E* I than it could by a timely petition to this Court. Having made that choice, petitioner is bound by it.

II. Argument

A. THE ISSUES NOW RAISED BY PETITIONER WERE WAIVED AT TRIAL AND SHOULD NOT BE CONSIDERED BY THIS COURT.

1. Petitioner Waived the Issue of Market Power in the Tying Product Market

The first argument raised by petitioner relates to market power in the tying product market. In neither the jury instruction conference nor anywhere else during the trial did petitioner specifically inform the court that it contended either that the tying product market was replacement parts generally or that respondent was required to prove market power in a market for replacement parts generally. Petitioner did not object to the aspect of the district court's instruction 28a, which defined the tying product market as Sterling replacement parts or that as-

pect of the district court's instruction concerning indicia of market power. Jury instruction 28a provides, in its entirety:

> For its second element, plaintiff must prove that Sterling possessed what is called "market power" with respect to *the tying product which is Sterling replacement parts.* Market power with respect to the tied product, which is electric motors, is not relevant. Market power is the ability to use dominance over the supply of a product to force others to buy or refrain from buying other products, or to do or refrain from performing other actions. Market power may be inferred from the tying product's desirability to consumers or from uniqueness in its attributes.
>
> If you find that Sterling had market power as I have defined it, then Plaintiff has proven the second element of its case.

(Tr. 955) (emphasis added).

Petitioner did not object to the definition of the tying product market, nor did it specifically object to any of the language the court used to describe market power. Instead, petitioner made only the following, cryptic objection:

> Defendant objects to Court's 28a in that it's an improper definition of market power since it contains no consideration of profit.

(Tr. 925.) Under Fed.R.Civ.P. 51, it is essential that an objection to an instruction specifically point out how the instruction is defective. Petitioner did not explain to the district court how instruction 28a should be corrected to obviate its objection regarding "profit." This objection certainly did not preserve petitioner's current theory in accordance with Rule 51. Petitioner does not claim to have stated "distinctly the matter objected to and the grounds of the objection." Fed.R.Civ.P. 51.

It is well-settled in this Court that, having not objected at trial, petitioner cannot now redefine the relevant market for the tying product. In *Palmer v. Hoffman*, 318 U.S. 109, 119 (1943), this Court held that failure to object to a jury instruction at trial precluded a new trial:

> Where a party might have obtained the correct charge by specifically calling the attention of the trial court to the error and where part of the charge was correct, he may not through a general exception obtain a new trial. In fairness to the trial court and to the parties, objections to a charge must be sufficiently specific to bring into focus the precise nature of the alleged error.

318 U.S. at 119; *accord Aspen Highlands, Skiing Corp. v. Aspen Skiing Co.*, 738 F.2d 1509, 1514 (10th Cir. 1984), *aff'd on other grounds*, 472 U.S. 585 (1985).

The rationale of *Palmer* was followed in *City of Springfield v. Kibbe*, 480 U.S. 257 (1987). In *Kibbe*, this Court granted *certiorari*. Upon learning of the petitioner's failure to object to jury instructions presenting the same legal issues upon which the writ was granted, this Court dismissed the writ as improvidently granted:

> We ordinarily will not decide questions not raised or litigated in the lower courts. . . . That rule has special force where the party seeking to argue the issue has failed to object to a jury instruction.

480 U.S. at 259. This Court in *Kibbe* found that petitioner had informed it of no special circumstances explaining its failure. Petitioner has never argued any special circumstances in this case—and there are none.

2. Petitioner Failed to Preserve its Claim Relating to Market Power in the Tied Product Market

Petitioner's claim that there was insufficient proof of a substantial threat of its obtaining market power in the tied-product market was also not preserved. Petitioner chose not to object to the portion of jury instruction 28a, *supra*, that "Market power with respect to the tied product, which is electric motors, is not relevant." (Tr. 955.) As noted above, petitioner's sole objection to 28a was that the definition of market power "contains no consideration of profit." (Tr. 925.) By failing to object to the portion of the instruction stating that market power in the "tied product market . . . is not relevant" petitioner waived that issue. As noted above, Rule 51 requires that an objection to an instruction specifically point out how the instruction is defective. *Aspen Highlands Skiing Corp. v. Aspen Skiing Co.*, 738 F.2d 1509, 1514 (10th Cir. 1984), *aff'd on other grounds*, 472 U.S. 585 (1985). Petitioner failed to do so. As also noted above, *Kibbe*, *supra*, at 10, holds that this Court will not reverse "a judgment because of instructions that the petitioner accepted and indeed itself requested." 480 U.S. at 259.

Petitioner's decision not to object to this instruction was a calculated concession that proof of power in the market for the tied product was not an element of respondent's case. As a result, two Seventh Circuit panels have found that no issue concerning market power in the market for electric motors was preserved for appeal.

3. Petitioner Fails to Challenge the Jury's Rule of Reason Verdict

There is a further answer to the entire petition, simple and irrefutable: The jury found for respondent on the "rule of reason" which, under the instructions given, re-

quired no proof of either of the elements that petitioner now argues were not proven. Petitioner cannot now complain about those instructions, instructions 32a and 33a,[1] because at trial petitioner did not preserve an objection as required by Rule 51. (Tr. 925.) The jury found that petitioner unreasonably restrained trade in violation of the "rule of reason." (App., *infra*, 2.)

Petitioner had ample opportunity to raise the arguments set forth in its petition as part of its case at trial. Instead, petitioner chose to wait and see if the outcome at trial was favorable. When petitioner found itself faced with an unfavorable verdict, it began raising arguments

---

[1] The relevant portion of Jury Instruction 32a and Jury Instruction 33a provided:

> If you find that Plaintiff has *failed to prove* either of the following elements: the second element of *market power* or the fourth element of forcing, but has proven the other elements of separate products, linking of sales, and some injury to Plaintiff's business, you must then evaluate the reasonableness of defendant's conduct.
>
> * * * *
>
> In determining whether Defendant's conduct was reasonable or unreasonable, you should consider, one, whether plaintiff has shown an actual adverse effect on competition; two, the nature of the particular industry involved; three, the nature or character of the conduct and practices of Defendant which Plaintiff contends unreasonably restrained trade; and, four, the history of the restraint; and, five, the purpose or end sought to be achieved by Defendant.
>
> If you find that the conduct of Defendant as alleged by the Plaintiff had the effect of unreasonably restraining trade, then the antitrust laws have been violated and you should return a verdict for the Plaintiff *regardless of whether it proved market power* or forcing.

(Tr. 957-58) (emphasis added).

which it unequivocally failed to preserve at trial. As summed up by Chief Judge Bauer: "And like the panel in *P&E* I, we do not believe it is unfair to require Sterling to live with the theory it presented at trial." (Pet. App. 12a.)

B. THE TIME TO PETITION THIS COURT EXPIRED ON APRIL 2, 1988.

The plain implication of the arguments asserted in its petition, considered in the light of those it failed to assert, is that petitioner is really asking this Court to review *P&E* I. Indeed, petitioner makes merely a passing reference to the law of the case holding in *P&E* II (Pet., p. 7), the only holding of law in that decision. In *P&E* I, the Seventh Circuit held that, given petitioner's waivers at trial, the district court's decision granting petitioner's post-trial motion for judgment n.o.v. was wrong. It concluded that the jury instructions given were proper. (Pet. App. 28a.) Furthermore, the Seventh Circuit stated that it reviewed the record to determine whether there was any basis for a new trial and concluded there was not. (Pet. App. 36a.) The verdict was not against the manifest weight of the evidence. (Pet. App. 39a.)

Having determined that the district court was mistaken in its conclusion that its instructions had been erroneous, but unsure whether it might have had other reasons, not in the record, for granting a new trial, the Seventh Circuit directed:

> If . . . the district court . . . believed, based upon some previously unstated but substantial and defensible grounds, that the manifest weight of the evidence favored Sterling when assessed against the instructions under which the jury deliberated, then the court may proceed with the new trial.

(Pet. App. 39a-40a.)

After the decision in *P&E* I, all of the issues presented to the Seventh Circuit had been plainly and properly settled with finality. If the district court, on remand, denied a new trial, there would be nothing to appeal unless it somehow failed to follow the Seventh Circuit's mandate. The petitioner knew that the proper way to have *P&E* I reviewed was by writ of *certiorari* to this Court; and, on January 14, 1988 petitioner filed with this Court an Application For Extension of Time to File Petition for Writ of *Certiorari*. (App., *infra*, 3.) In that application, petitioner conceded the case was over and ready for this Court, unless the district court granted a new trial:

> Petitioner seeks the extension pursuant to 28 U.S.C. § 2101(c) (1982) because intervening action by the district court in the next two months may eliminate the need to seek review by this Court. Specifically, *after ruling against petitioner on the issues that petitioner would raise in a petition for certiorari*, the Court of Appeals remanded the case for the trial court to determine whether the jury verdict was against the manifest weight of the evidence. Pursuant to the remand order, the district court set a briefing schedule on this "manifest weight" issue. Final briefs are due to be filed on February 3, 1988, one day after the petition for a writ of *certiorari* would otherwise be due.
>
> If the district court grants a new trial on the "manifest weight" issue, it is unlikely that petitioner will ask this Court to review the decision issued by the Court of Appeals on November 4, 1987. On the other hand, *if the district court denies the new trial motion, petitioner does anticipate the need to file a petition for certiorari* seeking review of the issues decided by the Court of Appeals.

(App., *infra*, 5) (emphasis added). On January 15, 1988, Justice Stevens extended the time for filing a petition for writ of *certiorari* to April 2, 1988. (App. 7-8.)

The district court proceeded in accordance with the mandate and held that the jury's verdict was not against the manifest weight of the evidence when assessed in the light of the instructions that guided the jury. (Pet. App. 54a.) The order, without an opinion, was entered on February 29, 1988. At that point, there was nothing for petitioner to appeal to the Seventh Circuit since that court had already determined in *P&E* I, that the instructions given were proper and that the jury's verdict was not against the manifest weight of the evidence. (Pet. App. 39a.)

Petitioner let its time to petition for *certiorari* from *P&E* I expire. Petitioner chose not to seek a writ of *certiorari* at the appropriate time. Instead, petitioner launched a collateral attack on *P&E* I, hoping that a different panel of the Seventh Circuit would reconsider *P&E* I. This collateral attack did not alter the time limit of 28 U.S.C. § 2101(c) for the review of *P&E* I.

Under similar circumstances, this Court has held that collateral proceedings in a court of appeals do not extend the time for petitioning for *certiorari* from an earlier final decision putting to rest the questions which the parties had litigated. In *Federal Trade Commission v. Minneapolis-Honeywell Regulator Company*, 344 U.S. 206 (1952), a petitioner sought to invoke this Court's jurisdiction more than ninety days after the final judgment, but within ninety days of a subsequent order. This Court held:

> Only when the lower court changes matters of substance, or resolves a genuine ambiguity in a judgment previously rendered should the period within which an appeal must be taken or a petition for *certiorari* filed begin to run anew. The test is a practical one. The question is whether the lower court, in its second order, has disturbed or revised legal rights and obligations which, by its prior judgment, had been plainly and properly settled with finality

> . . . . Indeed, the [original judgment] was for all purposes final. It put to rest the questions which the parties had litigated in the Court of Appeals. It was neither "tentative, informal nor incomplete." . . . Litigation must at some definite point be brought to an end.

344 U.S. at 211-13 (footnotes omitted).

The rationale of *Minneapolis-Honeywell*, *supra*, at 15, is applicable here. The time to petition for *certiorari* was after *P&E* I decided with finality all issues the parties had litigated. *P&E* II was petitioner's futile attempt to force the Seventh Circuit to appoint a panel to reconsider issues already decided in *P&E* I.

After the district court's order on remand, petitioner was confronted with a basic strategy decision. It could either proceed with a petition for *certiorari* to review *P&E* I, for which there was still plenty of time, or try appealing from the district court's order. Filing the notice of appeal would let the time for filing for *certiorari* expire, but would afford the opportunity to present the case to a new Seventh Circuit panel which *might* reconsider *P&E* I. Timely filing the petition for *certiorari* would pass up the opportunity for another crack at the Seventh Circuit at the risk that the final order in this case would become one of the thousands which this Court declines to consider.

The Seventh Circuit recognized that it was being asked to reconsider *P&E* I and the court refused to do so limiting its decision in *P&E* II to application of the law of the case. As Chief Judge Bauer stated: "This antitrust case is before us the second time. In our view, it should not be." (Pet. App. 1a) (citations omitted). The Seventh Circuit in *P&E* II did not "disturb or [revise] legal rights and obligations which, by its prior judgment, had been

plainly and properly settled with finality," so that the time to petition for *certiorari* did not begin to run anew. *Minneapolis-Honeywell*, 344 U.S. at 212-213. To paraphrase Chief Judge Bauer, we do not believe it is unfair to require petitioner to live with its appellate strategy. (*See*, Pet. App. 12a.)

CONCLUSION

Neither Seventh Circuit decision in this case creates a conflict with a decision of this Court or of another federal court of appeals. Nor does this case depart from any accepted or usual course of judicial proceeding. This case does not decide any questions of antitrust law or any other questions of importance. There are no reasons for this Court to grant the petition.

For the foregoing reasons, respondent requests that the petition be denied.

Respectfully submitted,

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August 28, 1989

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APPENDICES

APPENDIX 1

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

PARTS AND ELECTRIC MOTORS, INC., an Illinois corporation,	)	
Plaintiff-Counterdefendant,	)	
v.	)	No. 83 C 2349
STERLING ELECTRIC, INC., a Delaware corporation,	)	JUDGE HOLDERMAN
Defendant-Counterplaintiff.	)	

SPECIAL INTERROGATORIES TO THE JURY

1. Do you find from a preponderance of the evidence that parts for electric motors and electric motors are two separate and distinct products with separate markets?

ANSWER: Yes or No. YES

2. Do you find from a preponderance of the evidence that Defendant possessed the ability to use dominance over the supply of Sterling replacement parts to force others to buy or refrain from buying other products or to do or refrain from performing other actions?

ANSWER: Yes or No. YES

3. Do you find from a preponderance of the evidence that Defendant linked its sale of Sterling replacement parts to its sale of Sterling finished product?

ANSWER: Yes or No. YES

4. Do you find from a preponderance of the evidence that Defendant went beyond persuasion and conditioned the Plaintiff's purchase of Sterling replacement parts on its purchase of Sterling finished products?

ANSWER: Yes or No. YES

5. Do you find from a preponderance of the evidence that Plaintiff suffered some injury as a proximate result of Defendant's violations of the Antitrust laws?

ANSWER: Yes or No. YES

6. Do you find from a preponderance of the evidence that Defendant's conduct was an unreasonable restraint on trade?

ANSWER: Yes or No. YES

SO SAY WE ALL

APPENDIX 2

No. ____

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1987

STERLING ELECTRIC, INC.,
Petitioner,

v.

PARTS AND ELECTRIC MOTORS, INC.,
Respondent.

APPLICATION FOR EXTENSION OF TIME TO FILE PETITION FOR WRIT OF CERTIORARI

To The United States Court of Appeals
For The Seventh Circuit

To the Honorable John Paul Stevens, Associate Justice of the Supreme Court of the United States and Circuit Justice for the United States Court of Appeals for the Seventh Circuit:

Petitioner Sterling Electric, Inc.[1] prays that an order be entered extending the time to file a petition for a writ

[1] The parent company of petitioner Sterling Electric, Inc. is A.O. Smith Corporation. Sterling has no affiliates or subsidiaries other than wholly owned subsidiaries.

of certiorari for sixty (60) days, from February 2, 1988, to and including April 2, 1988. This application is being filed more than 10 days before the present deadline for filing the petition.

1. The judgment of the Court of Appeals for the Seventh Circuit was entered on November 4, 1987. Appendix A. The Court of Appeals issued its initial decision on August 18, 1987. The Court subsequently granted rehearing and issued an amended decision on November 4, 1987. Appendices B, C. A ninety-day period from entry of the Court of Appeals' judgment would expire on February 2, 1988. The requested 60-day extension would change the date for filing a petition to Saturday, April 2, 1988.

2. This Court's jurisdiction to review the Court of Appeals' decision will be invoked under 28 U.S.C. § 1254(1) (1982) and 28 U.S.C. § 1651 (1982).

3. The decision to be reviewed arises out of an antitrust case brought under Section 1 of the Sherman Act, 15 U.S.C. § 1, and Section 3 of the Clayton Act, 15 U.S.C. § 14. Parts & Electric Motors, Inc., a terminated distributor of petitioner's products, charged petitioner in this case with tying the sales of its electric motors to sales of its replacement parts. The jury returned a verdict for Parts & Electric Motors on this tying claim. The district court set aside that verdict, granting a judgment n.o.v. in favor of petitioner and, alternatively, a new trial.

4. The Court of Appeals reversed the judgment n.o.v. and remanded the case to the district court to consider whether a new trial should be granted. The Court of Appeals' decision held, among other rulings, that a motor manufacturer with less than one percent (1%) of the market for motors may be found to have market power because no other manufacturer chooses to produce replace-

ment parts for its motors. Antitrust tying claims have provoked a considerable amount of litigation in recent years, and as indicated in the Court of Appeals' decision, much controversy has developed regarding the interpretation and application of the Supreme Court's decisions in this area. The issues that petitioner would raise in a petition for certiorari are thus of substantial importance and merit review by this Court. *See* Supreme Court Rule 17.[2]

5. Petitioner seeks this extension pursuant to 28 U.S.C. § 2101(c) (1982) because intervening action by the district court in the next two months may eliminate the need to seek review by this Court. Specifically, after ruling against petitioner on the issues that petitioner would raise in a petition for certiorari, the Court of Appeals remanded the case for the trial court to determine whether the jury verdict was against the manifest weight of the evidence. Pursuant to the remand order, the district court set a briefing schedule on this "manifest weight" issue. Final briefs are due to be filed on February 3, 1988, one day after the petition for a writ of certiorari would otherwise be due.

If the district court grants a new trial on the "manifest weight" issue, it is unlikely that petitioner will ask this Court to review the decision issued by the Court of Appeals on November 4, 1987. On the other hand, if the district court denies the new trial motion, petitioner does anticipate the need to file a petition for certiorari seeking review of the issues decided by the Court of Appeals.

Due to the importance of the issues and the length of the briefing schedule, the district court is likely to issue

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[2] Many of the issues petitioner would raise are independent of the waiver issue decided by the Court of Appeals.

its decision on the new trial motion within approximately a month after briefing is completed on February 3. An extension of the deadline for filing a petition for certiorari until April 2 would leave petitioner a short period to prepare and file a petition if necessary, yet would avoid the burden on this Court and the parties of preparing and considering a potentially unnecessary petition. Petitioner does not believe that the extension it seeks would prejudice respondent, either on the merits or in preparing any brief in opposition to the petition for certiorari.

Wherefore petitioner respectfully requests that an order be entered extending the time to file a petition for certiorari to and including April 2, 1988.

Respectfully submitted,

/s/ DAVID G. NORRELL
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Counsel for Petitioner
Sterling Electric, Inc.

January 14, 1988

APPENDIX 3

OFFICE OF THE CLERK
SUPREME COURT OF THE UNITED STATES
WASHINGTON, D.C. 20543

January 15, 1988

David G. Norrell, Esquire
Kirkland & Ellis
Suite 1200
655 - 15th Street, N.W.
Washington, DC 20005

Re: Sterling Electric, Inc. v. Parts and Electric Motors, Inc., No. A-543

Dear Mr. Norrell:

Your application for an extension of time in which to file a petition for writ of certiorari in the above-entitled case has been presented to Justice Stevens, who on January 15, 1988, signed an order extending your time to and including April 2, 1988.

A copy of the Justice's order is enclosed.

Very truly yours,

JOSEPH F. SPANIOL, JR., Clerk

By

Edward L. Turner, Jr.
Assistant Clerk

kz
encl.

cc (letter only): John H. Ward, Esq.
Antonow & Fink
111 East Wacker Drive, Suite 3000
Chicago, IL 60601

Clerk, U. S. Court of Appeals for the
Seventh Circuit
(Your No. 83 C 2349)